

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC 2001-000849

04/11/2003

HONORABLE MICHAEL D. JONES

CLERK OF THE COURT
P. M. Espinoza
Deputy

FILED: _____

STATE OF ARIZONA

SAMUEL K LESLEY

v.

SHERRY K HUGHES

NEAL W BASSETT

PHX CITY MUNICIPAL COURT
REMAND DESK-LCA-CCC

MINUTE ENTRY

PHOENIX CITY COURT

Cit. No. #5855993

Charge: 1. DUI OR APC

DOB: 08/05/47

DOC: 11/12/00

This Court has jurisdiction of this appeal pursuant to the Arizona Constitution Article VI, Section 16, and A.R.S. Section 12-124(A).

This matter has been under advisement since its assignment on March 17, 2003. This decision is made within 30 days as required by Rule 9.8, Maricopa County Superior Court Local Rules of Practice. This Court has considered and reviewed the record of the proceedings from the Phoenix City Court, the exhibits made of record and the Memoranda submitted by counsel.

The facts of this case indicate that Appellant, Sherry K. Hughes, was stopped by the Phoenix Police on November 12, 2000 and accused of: (1) Driving While Under the Influence or Being in Actual Physical Control, a class 1 misdemeanor in violation of A.R.S. Section 28-Docket Code 512

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC 2001-000849

04/11/2003

1381(A)(1); (2) Having a Blood Alcohol Level Greater than .10 W/In 2 Hrs of Driving, a class 1 misdemeanor in violation of A.R.S. Section 28-1381(A)(2); and (3) Failure to Drive Within One Lane, a civil traffic violation in violation of A.R.S. Section 28-729.1. Appellant made a Motion to Suppress/Dismiss based upon the issue of “reasonable suspicion” by the Phoenix Police officers to make a stop of her vehicle. Appellant’s Motion was denied. Thereafter, the matter proceeded to a jury trial and Appellant was found guilty of Count 1. Appellant has filed a timely Notice of Appeal in this case.

The only issue presented on appeal is whether the trial court erred in denying Appellant’s Motion to Dismiss, wherein Appellant claimed that the police lacked a “reasonable suspicion” to stop her vehicle. An investigative stop is lawful if the police officer is able to articulate specific facts which, when considered with rational inferences from the facts, reasonably warrant the police officer’s suspicion that the accused committed, or was about to commit, a crime.¹ These facts and inferences when considered as a whole the (“totality of the circumstances”) must provide “a particularized and objective basis for suspecting the particular person stopped of criminal activity.”² A.R.S. Section 13-3883(B) also provides, in pertinent part, authority for police officers to conduct an “investigative detention”:

A peace officer may stop and detain a person
as is reasonable necessary to investigate an
actual or suspected violation of any traffic
law committed in the officer’s presence and
may serve a copy of the traffic complaint
for any alleged civil or criminal traffic violation.

A temporary detention of an accused during the stop of an automobile by the police constitutes a “seizure” of “persons” within the meaning of the Fourth Amendment even if the detention is only for a brief period of time.³ In *Whren*⁴, the United States Supreme Court upheld the District’s Court denial of the Defendant’s Motion to Suppress finding that the arresting officers had probable cause to believe that a traffic violation had occurred, thus the investigative detention of the Defendant was warranted. In that case, the police officers admitted that they used the traffic violations as a pretext to search the vehicle for evidence of drugs. The Court rejected the Defendant’s claim that the traffic violation arrest was a mere pretext for a narcotic search, and stated that the reasonableness of the traffic stop did not depend upon the actual motivations of the arresting police officers. Probable cause to believe that an accused has violated a traffic code renders the resulting traffic stop reasonable under the Fourth Amendment.⁵

¹ *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed. 2d 889 (1968); *State v. Magner*, 191 Ariz. 392, 956 P.2d 519 (App. 1988); *Pharo v. Tucson City Court*, 167 Ariz. 571, 810 P.2d 569 (App. 1990).

² *United States v. Cortez*, 449 U.S. 411, 417-18, 101 S.Ct. 690, 695, 66 L.Ed. 2d 621, (1981).

³ *Whren v. United States*, 517 U.S. 806, 809-810, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996).

⁴ *Id.*

⁵ *Id.*

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC 2001-000849

04/11/2003

The sufficiency of the legal basis to justify an investigative detention is a mixed question of law and fact.⁶ An appellate court must give deference to the trial court's factual findings, including findings regarding the witnesses' credibility and the reasonableness of inferences drawn by the officer.⁷ This Court must review those factual findings for an abuse of discretion.⁸ Only when a trial court's factual finding, or inference drawn from the finding, is not justified or is clearly against reason and the evidence, will an abuse of discretion be established.⁹ This Court must review *de novo* the ultimate question whether the totality of the circumstances amounted to the requisite reasonable suspicion.¹⁰

In this case the trial judge explained her ruling denying Appellant's Motion to Suppress/Dismiss. The trial judge explained:

At this time the defense motion to dismiss is denied. The Court finds that the officer did have reasonable grounds to stop the Defendant based upon her weaving even though it was within her lane, the testimony was that she at one point touched the lane dividers, at another point, almost struck the curb. The issue isn't whether or not this court would find by--the Defendant responsible for violating 28-729.1 by a preponderance of the evidence. This issue is whether this officer, viewing these--making these observations, can provide specific articulable facts as to why he stopped the car. And I think that in this case, the officer did provide those specific articulable facts. So at this time, the defense Motion to Dismiss is denied.¹¹

The trial judge's ruling is supported by the record. Phoenix Police Officer, Preston Park, testified that he followed Appellant on Camelback Road and observed her vehicle weave within its lane at least three times with both the front and rear right tires touching the lane dividers.¹² Appellant's vehicle changed lanes to the curb lane and again weaved toward the right over to the curb several times.¹³ Appellant's actions clearly gave rise to a reasonable suspicion on the part of the Phoenix Police Officer that either Appellant was violating the traffic code (by failing to drive safely within her lane) or that Appellant was impaired by alcohol or drugs.

⁶ *State v. Gonzalez-Gutierrez*, 1987 Ariz. 116, 118, 927 P.2d 776, 778 (1996); *State v. Magner*, Supra.

⁷ Id.

⁸ *State v. Rogers*, 186 Ariz. 508, 510, 924 P.2d 1027, 1029 (1996).

⁹ *State v. Chapple*, 135 Ariz. 281, 297, 660 P.2d 1208, 1224 (1983); *State v. Magner*, 191 Ariz. at 397, 956 P.2d at 524.

¹⁰ *State v. Gonzalez-Gutierrez*, 187 Ariz. at 118, 927 P.2d at 778; *State v. Magner*, 191 Ariz. at 397, 956 P.2d at 524.

¹¹ R.T. of October 8, 2001, at pages 58-59.

¹² Id. at pages 40, 42.

¹³ Id., at page 46.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC 2001-000849

04/11/2003

Appellant cites United States v. Colin¹³ for the proposition that because Appellant's weaving within a lane, or on the lane markings, did not violate A.R.S. Section 28-729.1, there were no reasonable grounds to justify the stop of her vehicle, and the case must be dismissed. Appellant acknowledges that United States v. Colin,¹⁴ is not binding on this court, but argues that it is a persuasive authority.¹⁵ Unfortunately, it is not a persuasive authority either, for the reasons of its unusual factual scenario. In that case, Eric Colin and co-defendant Efrain Estrada-Nava were stopped by officers who were investigating narcotics violations. Estrada-Nava was the driver of the vehicle and Colin was the passenger. The arresting officer testified that he made the stop to investigate possible violations of California Vehicle Code Section 21658(a) (Lane Straddling), and Section 21352(a) (Driving While Under the Influence of Intoxicating Alcohol). However, Estrada-Nava and Colin were charged only with one count of Possession of Methamphetamine with Intent to Distribute. In fact, and significantly, the officers never followed through on their investigation of Driving While Under the Influence of Intoxicating Alcohol, or the Lane Straddling charge. The court specifically noted:

...we find it curious that Carmichael (the arresting officer) did not conduct a sobriety field test or ask Estrada-Nava if he had been drinking when he stopped the car. This further convinces us that Carmichael did not harbor reasonable suspicion that Estrada-Nava was driving under the influence (citations omitted).¹⁶

The decision of the Ninth Circuit Court of Appeals in United States v. Colin¹⁷ must be limited to its unusual facts and circumstances. It is clear from the court's opinion that the court did not accept the arresting officer's explanation for the stop of Estrada-Nava's and Colin's vehicle. Importantly, no DUI or traffic investigation followed the stop of that vehicle, and the officers' testimony concerning their observations of the vehicle weaving were, therefore, insufficient to warrant a finding that the officers possessed a "reasonable suspicion" that would warrant the stop of the vehicle. More importantly, United States v. Colin¹⁸ will have little applicability to Arizona law because of the specific legislative authority granted in A.R.S. Section 13-3883(B) for officers to conduct an "investigative detention" to "investigate an actual or suspected violation of any traffic law... ." Weaving within a lane, driving upon the marked lane divider lines, and nearly hitting the curb constitute a "reasonable suspicion" that would warrant further investigation.

This Court determines *de novo* that the facts cited by the trial judge (the Honorable Cynthia Certa), and the facts contained within the trial court's record, do establish a reasonable

¹³ 314 F3d 439 (Ninth Circuit, 2002).

¹⁴ Id.

¹⁵ Appellant's Opening Memorandum, at page 5.

¹⁶ 314 F3d at 446.

¹⁷ Supra.

¹⁸ Supra.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC 2001-000849

04/11/2003

basis for the Phoenix Police officers to have stopped the automobile driven by the Appellant. Therefore, the trial judge did not err in denying Appellant's Motion to Suppress/Dismiss.

IT IS THEREFORE ORDERED affirming the judgment of guilt and sentence imposed by the Phoenix City Court.

IT IS FURTHER ORDERED remanding this matter back to the Phoenix City Court for all future proceedings in this case.

/S/ HONORABLE MICHAEL D. JONES

JUDICIAL OFFICER OF THE SUPERIOR COURT